Public Prosecutor v Govindnan a/l Chinden Nair

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO 41-22 OF 1997
AUGUSTINE PAUL JC
5 JANUARY 1998

Criminal Procedure *— Sentence — Plea of guilty — Whether guilty plea on its own entitles an accused to a lesser punishment — Whether such plea must be considered in the light of the other circumstances of the case*

Criminal Procedure *— Sentence — Adequacy of sentence — Repeat offender — Several previous convictions — Whether appellate court may interfere with sentence — Whether public interest requires enhancement of sentence*

Criminal Procedure *— Sentence — Previous convictions — Whether s 75 of the Penal Code (FMS Cap 45) may be invoked — Whether, in order to invoke this section, a separate charge stipulating allegations of previous convictions must be framed and recorded before sentence is passed — Whether s 87(2) of the Subordinate Courts Act 1948 a more appropriate provision for consideration — Criminal Procedure Code (FMS Cap 6) s 152(6)*

The accused was charged with an offence punishable under s 379 of the Penal Code (FMS Cap 45) ('the Code'). He pleaded guilty to the charge. The accused had a total of 11 previous convictions. For six of his previous offences, he was sentenced to a term of less than one year imprisonment; three years or less for three offences and five years for two offences including the last one. In sentencing the accused, the magistrate considered the fact that the accused had pleaded guilty and was of the view that a lenient sentence must be imposed following a guilty plea and sentenced the accused to a term of three years' imprisonment. The Public Prosecutor appealed against the sentence imposed. It was contended that the magistrate had placed undue emphasis on the guilty plea of the accused and had not considered the element of public interest in imposing sentence. Further, the magistrate had failed to give adequate consideration to the previous convictions of the accused and contended that s 75 of the Code ought to have been invoked to justify the imprisonment of a term of seven years' imprisonment.

Held, substituting the term of three years' imprisonment with seven years' imprisonment:

(1) The principles governing an appeal against sentence are settled. If a sentence is excessive or inadequate to such an extent as to satisfy an appellate court that when it was passed there was a failure to apply the right principles, then intervention by the court is justified. In sentencing generally, public interest must necessarily be one of the prime considerations. A major element of public interest is that justice means justice not only to the accused but also justice to society. Accordingly, in passing sentence, a court has to consider not only the offence and the offender, but also the interests of society. Where a person is

found to be a persistent offender, then it is in the interests of justice that a deterrent sentence should be passed. This does not mean that a person with previous convictions is not entitled to lenient treatment. But where a person's previous convictions increase progressively, the mitigating factors in his favour diminish correspondingly and may even be exhausted. A B

It is generally accepted that an accused person should be given credit or discount for pleading guilty. However, a guilty plea ought to be considered in favour of the accused only when all other factors and circumstances surrounding the commission of the offence justify such a consideration. Its application in favour of the accused depends on the circumstances of each case. Thus, there can be no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment. C

The magistrate, in imposing the sentence, had placed undue emphasis on the guilty plea of the accused. His opinion that a lenient sentence must be imposed following a guilty plea was clearly wrong in law. It overlooked the fact that the plea must be considered in the light of the other circumstances of the case. His further opinion that a long prison term will not reform the accused as indicated by the previous five-year term could not be sustained. This does not harmonize with the elementary principles of sentencing and detracts from the rationale of s 87(2) of the Subordinate Courts Act 1948 ('the Act') which empowers a magistrate to impose the full punishment prescribed for an offence on a convicted person if he is satisfied that the previous conviction or antecedents of that person warrant such a punishment. He had completely overlooked the element of public interest to be served in dealing with a persistent offender like the accused. The string of previous convictions of the accused had reached such a point that the mitigating factors in his favour had been exhausted. In the premises, this was a proper case where the magistrate ought to have acted under s 87(2) of the Act. As the magistrate had proceeded on wrong judicial principles, the sentence imposed by him warranted intervention by this court (see pp 190G, 191F–I and 192B–C, G–I). D E F G

(2) Where it is desired to invoke s 75 of the Code, a separate charge under the section must be framed and recorded if the accused is to be tried for an offence punishable under it. This accords with the requirement of s 152(6) of the Criminal Procedure Code (FMS Cap 6). A charge of having committed the offence after a previous conviction, therefore, should contain an allegation that the offence has been committed after a previous conviction. What must be stated in the charge are the facts, date and place of the previous conviction. If such statement has been omitted, the court may add it at any time before sentence is passed, but it cannot be done after sentence is passed. H I

In this case, no separate charge under the section was framed against the accused before he was sentenced. Neither was any application made to court to add it to the charge before the sentence was passed. Nor can the court take it into consideration while passing sentence if it has not been mentioned in the charge. Accordingly, the prosecution could not now seek to invoke the aid of the section. As the sentence that the prosecution had in mind was the maximum allowed by law for the offence in respect of which the accused had been charged and was beyond the five-year term of imprisonment that a magistrate may impose as provided by s 87(1) of the Act, a more appropriate provision for consideration is s 87(2) of the Act (see pp 188D–I and 189A–B, E–G).

[Bahasa Malaysia summary

Tertuduh dipertuduhkan dengan kesalahan yang boleh dihukum di bawah s 379 Kanun Keseksaan (NMB Bab 45) ('Kanun tersebut'). Dia mengaku salah kepada pertuduhan. Tertuduh mempunyai sebanyak 11 sabitan dahulu. Untuk enam daripada kesalahan dahulunya, dia dijatuhkan hukuman penjara yang kurang daripada setahun; tiga tahun atau kurang daripada itu untuk tiga kesalahan dan lima tahun untuk dua lagi kesalahan termasuk yang terakhir. Dalam menghukum tertuduh, majistret mempertimbangkan fakta bahawa tertuduh telah mengaku salah dan berpandangan bahawa hukuman yang ringan mestilah dijatuhkan berikutan akuan salah dan menghukum tertuduh kepada pemenjaraan selama tiga tahun. Pendakwa Raya merayu terhadap hukuman yang dijatuhkan. Ia dihujahkan bahawa majistret terlalu menitikberatkan akuan salah tertuduh dan tidak mempertimbangkan unsur kepentingan awam dalam menjatuhkan hukuman. Seterusnya, majistret telah gagal memberi pertimbangan yang mencukupi kepada sabitan dahulu tertuduh dan menghujahkan bahawa s 75 Kanun tersebut sepatutnya digunakan bagi memberi justifikasi kepada pemenjaraan untuk tempoh selama tujuh tahun.

Diputuskan, mengganti tempoh pemenjaraan tiga tahun dengan pemenjaraan tujuh tahun:

(1) Prinsip-prinsip yang menguasai suatu rayuan terhadap hukuman adalah mantap. Sekiranya sesuatu hukuman adalah melampau atau tidak memadai hinggakan memuaskan sebuah mahkamah rayuan bahawa apabila ia diluluskan terdapat kegagalan untuk memakai prinsip-prinsip yang betul, maka gangguan oleh mahkamah adalah berjustifikasi. Pada umumnya, dalam menghukum, kepentingan awam mestilah merupakan salah satu daripada pertimbangan utama. Suatu unsur kepentingan umum yang utama adalah bahawa keadilan bermakna keadilan bukan sahaja kepada tertuduh tetapi juga keadilan kepada masyarakat. Oleh itu, dalam menjatuhkan hukuman, sesebuah mahkamah

haruslah mempertimbangkan bukan sahaja kesalahan dan pesalah, tetapi juga kepentingan masyarakat. Di mana seseorang didapati adalah pesalah berulang-ulang, maka adalah dalam kepentingan awam bahawa hukuman pencegahan dijatuhkan. Ini tidak bermakna bahawa seseorang dengan sabitan dahulu tidak berhak mendapat layanan ringan. Tetapi di mana sabitan dahulu seseorang bertambah secara progresif, faktor-faktor peringanan yang memihak kepadanya berkurangan secara sepadan dan mungkin akan habis.

Adalah diterima secara umum bahawa seseorang tertuduh patut diberikan kredit atau diskaun kerana mengaku salah. Namun demikian, suatu akuan salah patut dipertimbangkan memihak kepada tertuduh hanya apabila segala faktor dan keadaan lain yang mengelilingi kelakuan kesalahan memberi justifikasi kepada pertimbangan sedemikian. Pemakaiannya memihak kepada tertuduh bergantung pada keadaan setiap kes. Justeru itu, tiada rukun automatik bahawa satu akuan salah dengan sendirinya memberi hak mendapat hukuman yang lebih ringan kepada tertuduh.

Dalam mengenakan hukuman, majistret terlalu mementingkan akuan salah tertuduh. Pendapat beliau bahawa hukuman yang ringan mestilah dikenakan berikutan akuan salah jelas adalah salah di sisi undang-undang. Ia mengabaikan hakikat bahawa akuan mestilah dipertimbangkan memandangkan keadaan kes yang lain. Pendapat lanjut beliau bahawa tempoh pemenjaraan yang lama tidak akan mengubah perangai tertuduh sebagaimana yang ditunjukkan oleh tempoh lima tahun terdahulu tidak boleh dikekalkan. Ini tidak berharmoni dengan prinsip-prinsip asas menghukum dan menyimpang daripada rasional s 87(2) Akta Mahkamah Rendah 1948 ('Akta tersebut') yang memberi kuasa kepada majistret untuk mengenakan hukuman penuh yang ditetapkan untuk kesalahan ke atas seorang yang disabit sekiranya beliau puas hati bahawa sabitan dahulu atau latar belakang orang itu mewajarkan hukuman demikian. Beliau telah terlepas perhatian unsur kepentingan awam hendaklah dipenuhi berkaitan dengan pesalah berulang-ulang seperti tertuduh. Deret sabitan dahulu tertuduh telah mencapai takat di mana faktor-faktor peringanan yang memihak kepadanya telah pun habis. Dalam keadaan ini, ini merupakan kes wajar di mana majistret sepatutnya telah bertindak di bawah s 87(2) Akta tersebut. Oleh kerana majistret telah meneruskan atas prinsip kehakiman yang salah, hukuman yang dijatuhkan oleh beliau mewajarkan gangguan oleh mahkamah ini (lihat ms 190G, 191F–I dan 192B–C, G–I).

(2) Di mana adalah wajar untuk menggunakan s 75 Kanun tersebut, satu pertuduhan berasingan di bawah seksyen tersebut mestilah dibuat dan direkodkan sekiranya tertuduh akan dibicarakan untuk kesalahan yang boleh dihukum di bawahnya. Ini adalah menurut keperluan s 152(6) Kanun Acara Jenayah (NMB Bab 6). Maka,

satu pertuduhan melakukan kesalahan selepas sabitan dahulu harus mengandungi pengataan bahawa kesalahan telah dilakukan selepas sabitan dahulu. Apa yang mesti dinyatakan dalam pertuduhan adalah fakta-fakta, tarikh dan tempat sabitan dahulu. Sekiranya pernyataan demikian telah tertinggal, mahkamah boleh menambahnya bila-bila masa sebelum hukuman dijatuhkan, tetapi ia tidak boleh dilakukan selepas hukuman dijatuhkan.

Dalam kes ini, tiada pertuduhan yang berasingan di bawah seksyen tersebut telah dibuat terhadap tertuduh sebelum dia dihukum. Tiada permohonan pun telah dibuat kepada mahkamah untuk menambahnya kepada pertuduhan sebelum hukuman dijatuhkan. Mahkamah juga tidak boleh mempertimbangkannya sewaktu menjatuhkan hukuman andainya ia tidak disebut dalam pertuduhan. Oleh itu, pihak pendakwa kini tidak boleh meminta supaya seksyen tersebut digunakan. Oleh kerana hukuman yang diinginkan oleh pihak pendakwa adalah maksima yang dibenarkan di bawah undang-undang untuk kesalahan yang mana tertuduh telah dipertuduhkan dan melebihi tempoh pemenjaraan lima tahun yang boleh dikenakan oleh majistret seperti yang diperuntukkan oleh s 87(1) Akta tersebut, peruntukan yang lebih wajar untuk dipertimbangkan ialah s 87(2) Akta tersebut (lihat ms 188D–I dan 189A–B, E–G).]

Notes

For cases on plea of guilty, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2528–2532.

For cases on adequacy of sentence, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2214–2233.

For cases on previous convictions, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2547–2549.

Cases referred to

Abu Bakar bin Alif v R [1953] MLJ 19 (refd)
Abdul Karim (1933) 29 NLR 309 (refd)
Abdul Wahab v PP [1970] 2 MLJ 203 (refd)
Chang Cheng Hoe & Ors, Re [1966] 2 MLJ 252 (refd)
Daulat Singh v State of Himachal Pradesh (1981) Cr LJ 1347 (refd)
Doraisami (1886) Mad 284 (refd)
Dungri v Emperor (1911) 12 PLR 516 (refd)
Empress v Haidar (1883) 3 AWN 110 (refd)
Harmohan Deb Nath v Jaha Baksha Patwari AIR 1943 Cal 25 (refd)
Lee Say & Ors v PP [1985] 2 CLJ 155 (refd)
Loh Hock Seng & Anor v PP [1980] 2 MLJ 13 (refd)
PP v Abdullah bin Pandak Hassan & Anor [1975] 2 MLJ 276 (refd)
PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
PP v Low Kok Wai [1988] 3 MLJ 123 (refd)
PP v Oo Leng Swee & Ors [1981] 1 MLJ 247 (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45 (refd)

PP v Sulaiman bin Ahmad [1993] 1 MLJ 74 (refd)
PP v Teh Ah Cheng [1976] 2 MLJ 186 (refd)
PP v Thatha Rao AIR 1968 AP 17 (refd)
Philip Lau Chee Heng v PP [1988] 3 MLJ 107 (refd)
R v Ball 35 Cr App R 164 (refd)
R v Costen (1989) II Cr App R (S) 182 (refd)
R v Leo De Cruz [1935] MLJ 1 (refd)
R v Teo Cheng Lian [1949] MLJ 170 (refd)
Rajcoomar Bose (1873) 19 WR (Cr) 41 (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134 (refd)
Sia Ah Kew & Ors v PP [1974] 1 MLJ 125 (refd)
State v Thampikannu AIR 1970 Ker 251 (refd)
Subramaniam v Emperor (1916) 1 MWN 327 (refd)
Wong Kai Chuen Philip v PP [1991] 1 MLJ 321 (refd)
Zaidon Shariff v PP [1996] 4 CLJ 441 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 37
Criminal Procedure Code (FMS Cap 6) ss 152(6), 173(m)(2), 253, Second Schedule Form XXVII(III)
Penal Code (FMS Cap 45) ss 75, 379, 380, 454
Subordinate Courts Act 1948 s 87(1), (2)

Maziah bte Abu (Deputy Public Prosecutor) for the appellant.
Accused in person.

Augustine Paul JC: The charge preferred against the accused in the Magistrate's Court at Melaka is as follows:

> Bahawa kamu pada 13 Januari 1997 antara jam 2.30 petang hingga jam 4 petang di Kampong Arongan, Pulau Sebang di dalam Daerah Alor Gajah, di dalam Negeri Melaka, dengan niat curang telah mengambil harta yang boleh dipindahkan iaitu wang tunai sebanyak RM3,800 kepunyaan En Cha How Lek KP 510724-05-5091 tanpa kebenarannya, oleh yang demikian kamu telah melakukan kesalahan dan boleh dihukum di bawah s 379 Kanun Keseksaan (NMB Bab 45).

When the charge was read and explained to the accused, he pleaded guilty. The learned magistrate was satisfied that the accused understood the nature and consequences of his plea. The prosecution then tendered a statement of facts which disclosed that on 13 January 1997, the complainant who was doing renovation work at certain premises stopped work as it was raining. He placed his purse on a pillar and took a rest. He soon fell asleep. When he woke up he found that cash amounting to RM3,800 was missing from his purse. The accused who was one of his workers was also missing. The complainant then made a police report. The accused was arrested on 8 April 1997. He admitted to the police that he had taken the money and had used it to buy items like drugs, clothes and shoes. The accused admitted the facts as read and explained to him and the learned magistrate accepted his plea. In his plea of mitigation, the accused prayed for leniency and said that he will not commit any further offences. The prosecution

A then tendered a list of previous convictions of the accused. He had a total of 11 previous convictions. The first was on 14 March 1980 and the last on 16 February 1994. Most of them were convictions under ss 379, 380 and 454 of the Penal Code (FMS Cap 45) ('the Code'). For six of his previous offences, he was sentenced to a term of less than one year imprisonment; three years or less for three offences and five years for two offences including the last one. In sentencing the accused, the learned magistrate took various factors into consideration. He considered the fact that the accused had pleaded guilty and was of the view that cases such as *Sau Soo Kim v PP* [1975] 2 MLJ 134 and *PP v Sulaiman bin Ahmad* [1993] 1 MLJ 74 show that a lenient sentence must be imposed following a guilty plea. He felt that credit must be given for a guilty plea as it saves time and costs and that a long prison term will not necessarily reform the accused. He found support for this in the previous five-year term imposed on the accused which did not appear to have had any effect on the accused. Having then considered the plea in mitigation of the accused, he sentenced him to a term of three years' imprisonment. He also ordered that the accused be given two strokes of the rotan and that he be subjected to police supervision for a period of one year after his release from prison. The Public Prosecutor appealed against the sentence imposed.

Before me, the learned deputy public prosecutor contended that the learned magistrate had placed undue emphasis on the guilty plea of the accused and had not considered the element of public interest in imposing sentence. She added that the learned magistrate had failed to give adequate consideration to the previous convictions of the accused and contended that s 75 of the Code ('the section') ought to have been invoked to justify the imprisonment of a term of seven years' imprisonment. In his reply, the accused prayed for leniency and asked that he be given another chance.

Before I proceed any further, I shall deal with the submission of the learned deputy public prosecutor on the applicability of the section which reads as follows:

> Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment for a term of three years or upwards, or having been convicted in any other part of Malaysia, in the Republic of Singapore or in the State of Brunei of an offence of a nature similar to any of those offences, shall be guilty of any offence punishable under either of those chapters with imprisonment for a term of three years or upwards, shall be subject for every such subsequent offence to double the amount of punishment to which he would otherwise have been liable for the same.

In order to satisfy the requirements of the section, three conditions must be satisfied. They are:

(a) the offence must be under either Chapter XII or XVII of the Code;

(b) the previous conviction must have been for an offence punishable with imprisonment for a term of three years or upwards; and

(c) the subsequent offence must also be punishable with imprisonment for a term of three years or upwards.

The object of the section is that when an offender having been convicted of an offence under Ch XII (offences relating to coin and government stamps) or Ch XVII (offences against property) of the Code, punishable with three years imprisonment or upwards commits an offence of similar description, he is liable to increased punishment on the ground that the punishment undergone has had no effect in preventing a repetition of the crime (see *State v Thampikannu* AIR 1970 Ker 251). The section does not constitute a substantive offence, but only imposes a liability to enhanced punishment. It must be noted that just because the provisions of the section are attracted in a particular case, it does not mean that the extreme punishment provided by the section must be inflicted. The provisions of the section are only permissive and not obligatory. This is borne out by the use of the words '... shall be subject ...' in the section. The section only provides for a maximum sentence; it does not provide for a minimum (see *Harmohan Deb Nath v Jaha Baksha Patwari* AIR 1943 Cal 25). The jurisdiction to inflict the enhanced punishment is to be exercised in a judicial manner after taking into consideration the entire circumstances of the case (see *Daulat Singh v State of Himachal Pradesh* (1981) Cr LJ 1347). Recourse should not be had to the section if the punishment provided for the offence is itself sufficient. However, where it is desired to invoke the section, a separate charge under the section must be framed and recorded if the accused is to be tried for an offence punishable under it (see *Doraisami* (1886) Mad 284; *Dungri v Emperor* (1911) 12 PLR 516; *Subramaniam v Emperor* (1916) 1 MWN 327). This accords with the requirement of s 152(6) of the Criminal Procedure Code (FMS Cap 6) ('the CPC') which reads as follows:

> If the accused has been previously convicted of any offence, and it is intended to prove such previous conviction for the purpose of increasing the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. If such statement is omitted, the Court may add it at any time before sentence is passed.

Form XXVII(III) of the Second Schedule to the CPC contains a specimen charge for theft after a previous conviction. It reads as follows:

> That you, on or about the ..... day of ..... , at ..... committed theft, and thereby committed an offence punishable under section 379 of the Penal Code.
>
> And further that you, before the committing of the said offence, that is to say, on the ..... day of ..... , had been convicted by the ..... at of an offence punishable under Chapter XVII of the Penal Code with imprisonment for a term of three years, that is to say, the offence of house-breaking by night (*describe the offence in the words used in the section under which the accused was convicted*) which conviction is still in full force and effect, and that you are thereby liable to enhanced punishment under section 75 of the Penal Code.

A charge of having committed the offence after a previous conviction, therefore, should contain an allegation that the offence has been committed after a previous conviction. What must be stated in the charge are the facts, date and place of the previous conviction (see *Empress v Haidar*

(1883) 3 AWN 110). If such statement has been omitted, the court may add it at any time before sentence is passed (see *Abdul Karim* (1933) 29 NLR 309). But it cannot be done after sentence is passed (see *Rajcoomar Bose* (1873) 19 WR (Cr) 41). I interpolate to add that the procedure to be followed when the section is invoked is as prescribed in s 253 of the CPC which reads as follows:

> Where the accused charged with an offence committed after a previous conviction for any offence the procedure hereinbefore laid down shall be modified as follows:
>
> (a) the part of the charge stating the previous conviction shall not be read out in Court, nor shall the accused be asked whether he has been previously convicted as alleged in the charge unless and until he has either pleaded guilty to or been convicted of the subsequent offence;
>
> (b) if he pleads guilty to or is convicted of the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the charge;
>
> (c) if he answers that he has been so previously convicted the Court may proceed to pass sentence on him accordingly, but if he denies that he has been so previously convicted or refuses to or does not answer such question the Court or in the case of a trial by jury the jury shall inquire concerning such previous conviction.

In this case, no separate charge under the section was framed against the accused before he was sentenced. Neither was any application made to court to add it to the charge before the sentence was passed. Nor can the High Court take it into consideration while passing sentence if it has not been mentioned in the charge (see *PP v Thatha Rao* AIR 1968 AP 17). Accordingly, the prosecution cannot now seek to invoke the aid of the section. I therefore dismissed this submission by the learned deputy public prosecutor.

As the sentence that the prosecution has in mind is the maximum allowed by law for the offence in respect of which the accused has been charged and is beyond the five-year term of imprisonment that a magistrate may impose as provided by s 87(1) of the Subordinate Courts Act 1948 ('the Act'), a more appropriate provision for consideration is s 87(2) of the Act which reads as follows:

> Notwithstanding subsection (1), where a First Class Magistrate has convicted any person and it appears that, by reason of any previous conviction or of his antecedents, a punishment in excess of that prescribed by subsection (1) should be awarded, then the First Class Magistrate may award the full punishment authorized by law for the offence of which the person has been convicted and shall record his reason for so doing.

As the Federal Court explained in *Loh Hock Seng & Anor v PP* [1980] 2 MLJ 13, the prescribing of a maximum penalty in respect of an offence not only marks the limits of the court's discretionary power as to sentence, it also ordinarily prescribes what the penalty should be in the more serious types of cases falling within the relevant class of the offence meriting the maximum punishment prescribed. It is a long and well established principle of sentencing that the legislature in fixing the maximum penalty for a

criminal offence intends it only for the worst cases (see *Sia Ah Kew & Ors v PP* [1974] 1 MLJ 125). Section 87(2) of the Act empowers a magistrate to impose the full punishment prescribed for an offence on a convicted person if he is satisfied that the previous conviction or antecedents of that person warrant such a punishment. Thus, the previous conviction and antecedents of a convicted person play a pivotal role in sentencing him. Where a magistrate acts under this provision of law, it is mandatory for him to also state his reasons for so acting in writing. It must be noted that s 37 of the Courts of Judicature Act 1964 provides that where a magistrate has acted under this provision, and no appeal has been lodged against the sentence, he must transmit the record of the proceedings to the High Court so that the High Court may satisfy itself as to the correctness, legality or propriety or otherwise of the sentence so imposed in the exercise of its special powers (see *PP v Abdullah bin Pandak Hassan & Anor* [1975] 2 MLJ 276). *Abdul Wahab v PP* [1970] 2 MLJ 203 is an illustration of the use of the power conferred by s 87(2) of the Act by the High Court. In that case, the accused who had pleaded guilty to an offence under s 457 of the Code had 12 previous convictions. He was sentenced to two years' imprisonment, the maximum that a magistrate may then impose, and six strokes of rotan to be followed by 12 months of police supervision by the learned magistrate. In the course of his judgment, Sharma J said at p 204:

> In view of the provisions of s 87(2) of the Courts Ordinance, I am of the view that the magistrate was empowered to pass the maximum sentence provided under s 457 of the Penal Code.

His Lordship accordingly set aside the order of the learned magistrate and substituted therefor a sentence of ten years' imprisonment, the maximum term of imprisonment for the offence being 14 years, and six strokes of the rotan followed by 12 months' police supervision.

Having dealt with the preliminary issues of law, I shall now deal with the merits of the appeal.

The principles governing an appeal against sentence are settled. If a sentence is excessive or inadequate to such an extent as to satisfy an appellate court that when it was passed there was a failure to apply the right principles, then intervention by the court is justified (see *Abu Bakar bin Alif v R* [1953] MLJ 19). In *R v Leo De Cruz* [1935] MLJ 1, Huggard CJ said at the same page:

> In regard to appeals against sentence, it has been laid down that the court will not interfere with the sentence, unless the judge has proceeded on wrong principles or given undue weight to some of the evidence.

In *R v Teo Cheng Lian* [1949] MLJ 170, Gordon-Smith J said at p 171:

> There must be a manifest error, either in law or in considering the facts and circumstances of the case or an omission to consider such facts and circumstances, before the higher court interferes with the discretion undoubtedly vested in the lower court.

Section 173(m)(2) of the CPC deals with the imposition of sentences in the subordinate courts. The subsection reads as follows:

> If the Court finds the accused guilty or if a plea of guilty has been recorded and accepted the Court shall pass sentence according to law.

The phrase 'pass sentence according to law' means that the sentence imposed must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles (see *Re Chang Cheng Hoe & Ors* [1966] 2 MLJ 252; *PP v Jafa bin Daud* [1981] 1 MLJ 315; *Philip Lau Chee Heng v PP* [1988] 3 MLJ 107). In *R v Ball* 35 Cr App R 164, the Court of Criminal Appeal restated the principles which should guide a court in assessing the appropriate sentence that should be passed in the following terms:

> In deciding the appropriate sentence, a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition that, if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

Thus, in sentencing generally, the public interest must necessarily be one of the prime considerations (see *PP v Teh Ah Cheng* [1976] 2 MLJ 186). A major element of public interest is that justice means justice not only to the accused but also justice to society. Accordingly, in passing sentence, a court has to consider not only the offence and the offender, but also the interests of society. The court acts as a vehicle to show abhorrence to particular types of criminal conduct. This function can be effectively discharged only by passing appropriate sentences to suit the circumstances of a particular case. Where a person is found to be a persistent offender, then it is in the interests of justice that a deterrent sentence should be passed (see *PP v Jafa bin Daud* [1981] 1 MLJ 315). This does not mean that a person with previous convictions is not entitled to lenient treatment. But where a person's previous convictions increase progressively, the mitigating factors in his favour diminish correspondingly and may even be exhausted. In this regard, useful reference may be made to *Principles of Sentencing* by DA Thomas where the learned author says at p 176:

> The mitigating effect of good character is not, as has been argued already, confined to the man with no previous convictions; the true position is that it diminishes as the offender's criminal record increases, until it reaches a point at which it is exhausted.

It is generally accepted that an accused person should be given credit or discount for pleading guilty (see *PP v Ravindran & Ors* [1993] 1 MLJ 45).

However, as I had the occasion to observe in *Zaidon Shariff v PP* [1996] 4 CLJ 441 at p 446:

> ... Be that as it may, this rule is not a strict rule as the court may, in the exercise of its discretion, refuse to grant any discount in appropriate cases (see *Lee Say & Ors v PP* [1985] 2 CLJ 155.

In my opinion, a guilty plea ought to be considered in favour of the accused only when all other factors and circumstances surrounding the commission of the offence justify such a consideration. Its application in favour of the accused depends on the circumstances of each case (see *Wong Kai Chuen Philip v PP* [1991] 1 MLJ 321). In *PP v Low Kok Wai* [1988] 3 MLJ 123, Mohamed Dzaiddin J (as he then was) said at p 124:

> ... In the present case, the only mitigating factor is the accused's plea of guilty. It is a principle of sentencing that whenever possible the court should take into account as a mitigating factor the fact that the accused has pleaded guilty. The extent to which a plea of guilty is a mitigating factor must depend on the facts of each case, and it cannot be a powerful mitigating factor when effectively no defence to the charge was available to the accused (see *Archbold* (42nd Ed) para 4-480 citing *R v Davis* (1980) 2 Cr App R (s) 168).

The severity of the offence committed may outweigh the mitigating effect of a guilty plea (see *Lee Say & Ors v PP* [1985] 2 CLJ 155; *Loh Hock Seng v PP* [1980] 2 MLJ 13; *PP v Oo Leng Swee & Ors* [1981] 1 MLJ 247). Where public interest demands a deterrent sentence in the circumstances of a particular case, then the effect of such a plea must also give way. In this regard, I refer to *R v Costen* (1989) II Cr App R (S) 182 where Lord Lane said at p 184:

> But there are certain exceptions, likewise well authenticated in the authorities, to that general rule that discount will be allowed for a plea of guilty. The first and most important exception is the protection of the public. Where it is necessary that a long sentence, if necessary the maximum sentence, should be passed in order to protect the public, in those circumstances, a plea of guilty may not result in any discount.

Thus, there can be no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment.

It is my view that the learned magistrate, in imposing the sentence, had placed undue emphasis on the guilty plea of the accused. His opinion that a lenient sentence must be imposed following a guilty plea is clearly wrong in law. It overlooks the fact that the plea must be considered in the light of the other circumstances of the case. His further opinion that a long prison term will not reform the accused as indicated by the previous five-year term cannot be sustained. This does not harmonize with the elementary principles of sentencing and detracts from the rationale of s 87(2) of the Act. He had completely overlooked the element of public interest to be served in dealing with a persistent offender like the accused. As the learned magistrate had proceeded on wrong judicial principles, the sentence imposed by him warranted intervention by this court. In my view, the string of previous convictions of the accused had reached such a point that the

A mitigating factors in his favour had been exhausted. His involvement in crime immediately after coming out of the prison gates after having served a five-year term for an offence under s 454 of the Code indicates his difficulty in reforming. In his own interest, it is best that he re-enters the gates which are so familiar to him for the longest period possible. His incarceration inside for a long term will leave in peace those who are outside. In the premises, it was my view that this was a proper case where the learned magistrate ought to have acted under s 87(2) of the Act. In the upshot, I varied the prison term imposed on the accused and substituted it with an order of imprisonment for seven years. The other orders made by the learned magistrate shall remain.

Order accordingly.

Reported by Jafisah Jaafar